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SUPREME COURT, U.S.

No. 85-1722

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EDWARD O'LONE, JAMES UCCI and
WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is appropriate for this Court to review a lower court's holding that the state must make a reasonable effort to accommodate both the inmates' protected constitutional rights and the institution's legitimate concerns where a state prison discontinued its prior practice of allowing minimum and gang minimum security Muslim inmates the right to attend Jumu'ah (an obligatory congregational Friday Sabbath service) and where attendance at the service posed no security threat to the institution, the service had occurred for five years without incident, and maximum security inmates were still permitted to attend the service.

2. Whether the Court of Appeals for the Third Circuit erred when, in remanding this case to the district court, it held that when a state prison discontinued its prior practice of allowing lesser security Muslim inmates the right to attend their only weekly Sabbath worship service while maximum security inmates were still permitted to attend the service, the state must make a reasonable effort to accommodate the inmates' First Amendment right of free exercise of religion and the state's legitimate penological interests.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Sadr-Ud-Din Nafis Mateen and the Estate of Ahmad Uthman Shabazz respectfully pray that the petition for a writ of certiorari be denied.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey, dated October 15, 1984, is reported at 595 F. Supp. 928 (D.N.J. 1984) and appears in the Appendix to petitioners' petition for a writ of certiorari at 39A-55A. The opinion of the United States Court of Appeals for the Third Circuit, sitting en banc, dated January 27, 1986, is reported at 782 F.2d 416 (3d Cir. 1986) and appears in the Appendix to petitioners' petition for a writ of certiorari at 1A-38A.

JURISDICTION

The case was argued before the United States Court of Appeals for the Third Circuit on June 21, 1985. The case was reargued before the Court en banc on November 12, 1985 and was decided on January 27, 1986. A petition for a writ of certiorari was timely filed. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall... deny to any person within its jurisdiction the equal protection of the laws.

3. Title 42 U.S.C. §1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Sadr-Ud-Din Mateen and Ahmad Uthman Shabazz were two incarcerated inmates at Leesburg State Prison, Leesburg, New Jersey. The inmates contested the institution's decision of March, 1984, to discontinue its practice of the previus five years, of permitting minimum and gang minimum security inmates the right to attend Jumu'ah, an obligatory Muslim Sabbath service occurring each week for about an hour on Fridays at approximately noontime.[1] Both Shabazz and Mateen have been practicing members of the Islamic faith for many years. Petitioners have conceded the sincerity of the religious beliefs of both inmates (40A).

Leesburg State Prison (hereinafter referred to as "the main facility") is a medium security institution, located on approximately 1100 acres of land, which houses inmates who are classified as maximum and gang minimum custody status (40A). Prisoners at Leesburg are initially classified upon entering the facility as being maximum, gang minimum, or minimum security risks. Prisoners who are assigned maximum custodial status and thus are considered the greatest security risks, are not eligible for furloughs, work release, or work detail in areas outside of the prison compound and must be incarcerated within the prison complex. Gang minimum is an intermediate custodial status between maximum and minimum. Inmates initially classified as maximum may be promoted after a specified period of time to gang minimum security status and are permitted to work on certain outside work details.

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1 Although both were inmates at the time suit was filed and at the time this matter was initially heard by the court of appeals, Mateen was paroled on July 17, 1985 and Shabazz died while imprisoned on January 15, 1986. Mateen and Shabazz sought both injunctive and monetary relief. The institution has continued its policy of denying lesser security Muslim inmates the right to attend the only weekly Sabbath congregational service of their faith.

Prisoners can also be assigned to minimum security status. In addition to the main prison facility, the Leesburg prison administration operates two minimum security units, the "Farm" and the Ancora unit, which are physically separate and geographically distinct from the main facility. Unlike the main institution, which is surrounded by a 12 foot high fence topped with barbed wire, the Farm is an open area, without a wall or a fence, and prisoners may enter and exit from the Farm without passing through the receiving gates for the main facility. Inmates classified as minimum security are relocated to the Farm or Ancora units. Many minimum security inmates are assigned to outside work details and all are eligible to work outside of the institution with m' imal supervision.

Leesburg initiated the outside work detail program in April, 1983, pursuant to a new state corrections policy that stipulated that inmates could not be transferred directly from maximum security to minimum security custodial status, but instead must pass through an intermediate, or gang minimum status.

Prior to March 7, 1984, all Muslim inmates at both the main facility and the minimum units, even those who since April, 1983 had been assigned to outside work details, were able to attend Jumu'ah, the Muslim Sabbath worship service. Jumu'ah services are held every Friday at Leesburg, with separate services conducted for inmates housed in the main facility and on the Farm. The service lasts approximately 45 minutes to an hour.

Jumu'ah, which literally means the day of gathering or day of assembly is an obligatory prayer, required of each Muslim, which must be performed in a congregation every Friday. The service takes the place of Zuhr, the second Muslim prayer of the day, and it may only be said during a limited number of hours on Friday.[2]

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2 Jumu'ah must be held after the time that the sun has reached its apex and until the time for the third Muslim prayer of the

Footnote Cont'd

Unlike other Muslim prayers which can be made up individually, Jumu'ah is obligatory, cannot be made up and must be performed in congregation (3A, 43A).

Jumu'ah is regarded as the most important weekly service in the Muslim religion, and the obligation to attend the Jumu'ah worship service is commanded in the holy Qur'an, which is the central book of the Muslim religion and sets forth its basic tenets and principles. It is undisputed that Jumu'ah is a central practice in the Muslin faith (3A, 43A).

Mateen testified that to his knowledge, Jumu'ah services had been conducted on a regular basis at Leesburg for at least the past five years (43A). Prior to March 7, 1984, those gang minimum Muslim prisoners who wished to attend Jumu'ah and who were housed at the main facility and assigned to outside work details during the week, were allowed to remain in the prison and work on an alternate detail on Fridays so that they could attend the service.[3] Muslim prisoners housed on the Farm (the minimum security unit), who were assigned outside work details and wished to participate in the Jumu'ah service, reported to their regular work assignment and were permitted to return by themselves to the Farm to worship.

Until March of 1984, Mateen, like other gang minimum inmates who were assigned an outside work detail during the week, was assigned an alternate work detail inside the institution on Friday, so that he could attend the Jumu'ah service. On Fridays, Mr. Mateen was reassigned to the wood sawing detail, which cut wood inside the institution to a specified length and measurement. He stated that there was always work available.

Footnote Cont'd From Previous Page

day, which is known as Asr. Although the time for Jumu'ah will vary slightly depending upon the time of year, it must be recited during specified hours, normally around noontime.

3 Any inmate inside the main facility, regardless of security classification, was eligible to attend the Jumu'ah service.

In March of 1984, without warning or explanation, petitioners changed the alternate work detail from gang minimum to maximum, so that neither Shabazz nor Mateen were able to remain in the main facility on Fridays to attend the Jumu'ah service.

Petitioners offered no reason why suddenly, in March of 1984, they discontinued the alternate work detail for Muslim inmates on Fridays, other than the rational that this work was subsequently assigned to maximum security inmates.[4] Indeed, when asked about this change, James Ucci, Chief Deputy at Leesburg stated:

> The Court: Tell me why you, after March of 1984, this notice, you were unable or it was not considered wise to continue to permit plaintiffs such as these to stay in, as you had permitted before that time, to stay inside the prison on Friday and go to Jumu'ah? Tell me again, what's the reason for that?
>
> The Witness: Well, for one, they are assigned to a work detail, which work is required.
>
> The Court: Well, they were assigned to a work detail before and they were allowed to stay in on Friday.
>
> The Witness: But that detail is no longer in existence.
>
> The Court: Why not?
>
> The Witness: Because we put maximum inmates there and we moved the gang minimum inmates outside the institution. That's a maximum detail. That detail is inside the wall now, or fence.
>
> The Court: Well, isn't that bootstrapping? You say, well, we can't allow them to stay in after March of 1984 because they're not max and they're -- we made them max inside. Well, they can't come in because of what you did after March of 1984.

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4 According to the work detail records that were supplied by Leesburg, there are a total of 47 work details, 10 of which involve work outside the main facility. Approximately 125 prisoners were ordinarily assigned each week to outside work details during 1983-1984. These records also show that there are many jobs inside the institution which could be used for alternate work details on Friday so that lesser security Muslim inmates could continue to attend Jumu'ah worship. Moreover, petitioner Ucci admitted that if the Muslim inmates presently at the Farm remained inside the institution on Friday in order to attend Jumu'ah, there would be sufficient available manpower to staff all of the outside work details as well as to provide work assignments for Muslim inmates.

Prior to March of 1984, there is no evidence of any problems or inmate resentment because Muslim prisoners were permitted to work on an alternate detail in order to attend Jumu'ah worship. Nor is there any evidence that during the five previous years when all Muslim inmates were permitted to attend Jumu'ah worship, this religious practice posed any threats or security difficulties for the institution.

On March 7, 1984, Superintendent O'Lone and Ucci issued a new policy directive which stated:

> Due to the increase of the size of the outside details at both Medium and Minimum, once an inmate goes to work in the morning, he will remain on his detail throughout the day. He will no longer be brought back into the institution on a normal day unless it is an emergency.
>
> In the event of an emergency, your detail officer will contact his immediate supervisor, who will see to it that you are brought in.[5]

Because most gang minimum inmates at the main prison facility and minimum inmates at the Farm are now being assigned outside work and the institution, in March, 1984, discontinued the alternate

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5 Despite the representation made in the prison's March 7, 1984 memo, the prison records show that at least in the main prison facility, both the number of outside work details and the number of prisoners assigned to these outside work details declined immediately before and after the March 1984 policy change. Thus, the evidence indicates that the peak period for outside work details was November 1983 and the number of inmates involved has declined substantially thereafter. Both petitioners Ucci and O'Lone admitted that the size of the outside details had not increased. More specifically, as of November 17, 1983, there were 156 inmates assigned to 11 outside details. Since that date, the numbers indicate a constant decline, as by December 15, 1983, there were 10 details and 141 inmates, on February 3, 1984, 137 prisoners assigned to 10 details, and by March 2, 1984, five days before the change in policy, there were only 124 inmates assigned to 8 outside details. After the March 7 policy changes, the numbers dropped even further. On March 9, there were 106 inmates assigned to 8 details, on April 20, only 90 prisoners and 7 details, and by June 1, 1984, only 86 inmates assigned to outside details, almost 50 percent fewer inmates than were assigned six months previously. Thus, the state's own statistics contradict their purported justification for the March 1984 policy change.

Friday inside work detail for Muslim inmates, and petitioners also in March, 1984, adopted a new work policy which precluded any inmate on outside detail from returning to the institution for any reason whatsoever, most gang minimum and minimum inmates are no longer able to participate in the Jumu'ah worship service.

Ironically, inmates in maximum custody status, inmates who are considered the greatest security risk and must be assigned an inside work detail, are still able to attend the Jumu'ah worship service.

Although in their petition to this Court, petitioners stress that the March 7, 1984 policy change was effectuated to reduce congestion at the receiving gate at the main facility (Petition at 4-5), no gang minimum prisoners from the main facility ever returned for Jumu'ah because they were assigned to an alternate detail on Fridays inside the prison. Thus, not only is the March 7, 1984 policy overbroad in that it prevents prisoners who have legitimate constitutionally protected rights from returning, but any traffic congestion problems which may have resulted from the prison's prior policy relating to return from work details was wholly unrelated to attendance at the Jumu'ah service.[6]

Prisoners who returned to the minimum security unit at the Farm to attend Jumu'ah worship walked into the minimum security prison on their own, and they were not checked or strip searched. Petitioners conceded that there were no traffic congestion problems at the minimum security unit caused by inmates returning for Jumu'ah or for any other reason. Any congestion problems which may have existed at the main facility and prompted the March 7, 1984 policy change, were not caused by and were wholly unrelated to conditions at the minimum security units.

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6 Prison records indicate that between August, 1983 and April, 1984, population in the medium security unit declined from 754 to 691 inmates. The prison population of the entire Leesburg complex has remained stable over that time.

In addition to the work details operating during the week, there are also outside work details which operate six or seven days each week, resulting in some gang minimum inmates working on Saturdays and/or Sundays. Although prison guards are available to supervise these weekend work details, petitioner O'Lone testified that additional weekend work "would be met with extraordinary resistance from the officers...who have a traditional expectation in some regards of a Monday through Friday work week."

No inmates practicing other religions have been forced to forego their weekly Sabbath services. If respondents had refused to work on Fridays in order to attend Jumu'ah, they would have been disciplined for such misconduct. In the past, there were no security problems precipitated by inmates attending Jumu'ah worship. Petitioners conceded that Muslim inmates constitute no greater discipline problem or security risk than any other inmates at the institution.

Pursuant to 42 U.S.C. §1983, inmates Shabazz and Mateen filed a civil rights Complaint in the United States District Court for the District of New Jersey. Shabazz and Mateen alleged that petitioners, in changing their policies in March, 1984 to deprive Muslim prisoners of their prior right of attending Jumu'ah, the Muslim Friday Sabbath service, abridged their First Amendment right of the free exercise of religion and violated the Fourteenth Amendment, by denying them rights afforded adherents of religions with Saturday or Sunday Sabbath services. Moreover, respondents contended that petitioners made no effort to explore the readily available alternatives which would botn accommodate the inmates' commands of conscience and constitutional rights, while protecting the institution's legitimate concerns. Shabazz and Mateen sought both preliminary and permanent injunctive relief as well as compensatory and punitive damages.

Following a hearing, the district court found no constitutional violation (39A-55A). The district court conceded that petitioners' changes in policies constitute the "most restrictive alternative" (53A), but the court opined that prison officials have no obligation to affirmatively demonstrate that a restriction on the free exercise rights of inmates "would in fact be detrimental to proper penological objectives..." (51A). According to the district court, a prison regulation abridging an inmate's First Amendment rights is still valid even if it is overbroad and "catch[es] within it some individuals for whom the same goals could be achieved with less trampling upon their rights" (52A).

Respondents filed a timely appeal to the United States Court of Appeals for the Third Circuit. The case was argued before a panel of that court on June 21, 1985. Prior to issuance of a decision, the court sua sponte on August 29, 1985, set down the matter for rehearing en banc (56A).

The Court of Appeals, in a nine-to-two ruling, vacated the decision of the trial court and remanded the matter for reconsideration. The majority stressed that the district court evaluated the inmates' claims under the standards articulated in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir.), rehearing denied, 643 F.2d 103 (3d Cir. 1980). Under the St. Claire test, the state need only "produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security." Id. at 114. Such evidence may consist of the expert testimony of prison officials who profess to believe that such a potential danger exists, if the officials' opinions are "held 'sincerely' and [are] arguably correct." Id. (citation omitted). Once the state has satisfied its burden under the St. Claire analysis, the court must defer to the prison officials' judgment unless the inmate shows "by 'substantial evidence... that the officials have

exaggerated their response' to security considerations... or that their beliefs are unreasonable." Id. at 115 (citations omitted) (5A-6A).

The Third Circuit, in its opinion, recognized the expertise of prison administrators and the need for deference to the judgment of experienced prison officials (6A-7A). The Court of Appeals also emphasized this Court's admonition that inmates retain "those constitutional rights that are not inconsistent with their status as prisoners or with the legitimate penological goals of the corrections system" (7A) (citations omitted). The court stressed that there must be a mutual accommodation between the institution's objectives and the constitutionally protected rights of prisoners (7A) (citations omitted).

In modifying the St. Claire test, the court below did not reach the ultimate question of whether the challenged regulations impermissibly impinged upon the inmates' religious rights (9A). Rather, the court explained that the St. Claire standard which did not require any inquiry into the feasibility of accommodating prisoners' religious practices, provided inadequate protection for inmates' constitutional rights to freely exercise their religion (9A). The court held that where "reasonable methods of accommodation can be adopted without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' first amendment rights." (10A) (footnote omitted).

In so holding, the Court of Appeals reiterated that it "must afford deference to decisions by prison officials ... but... such deference must be tempered by an effort to accommodate free exercise values." (Id.). The court conceded that the record in this case reveals particularly strong interests both on the part of the

prisoners as well as the prison administrators. The challenged regulation prohibits inmates from attending the only weekly Sabbath service of their faith and there is no indication that participation in the service by lesser security prisoners, which was allowed for five years previously, posed any security problems. The court also recognized that the security problems identified by the state cannot be disregarded and are worthy of serious consideration. Although the court stressed the difficulties inherent in an effort to accommodate the sincere religious beliefs and practices of the inmates and the security problems of the institution, "federal courts are not free to abdicate their responsibility to see that a proper accommodation is achieved." (11A-12A). The Court of Appeals for the Third Circuit remanded the case for reconsideration in light of its opinion.

REASONS WHY THE WRIT SHOULD BE DENIED

1. THE REQUIREMENT THAT THE STATE MAKE A REASONABLE EFFORT TO MUTUALLY ACCOMMODATE THE CONSTITUTIONAL RIGHTS OF INMATES TO FREELY EXERCISE THEIR RELIGION AND THE INSTITUTION'S PENOLOGICAL CONCERNS, WHEN THE STATE DISCONTINUES ITS PRIOR PRACTICE OF PERMITTING LESSER SECURITY MUSLIM INMATES FROM ATTENDING THE ONLY WEEKLY CONGREGATIONAL SABBATH SERVICE OF THEIR FAITH, COMPORTS WITH THE VALUES UNDERLYING THE FIRST AMENDMENT.

Petitioners contend that the Third Circuit's requirement of a reasonable effort to mutually accommodate inmates' First Amendment rights to freely exercise their religion and an institution's legitimate penological interests contravenes approaches taken by other courts (Petition at 9-12) and contradicts decisions of this Court (Petition at 12-17). Instead of mutual accommodation, petitioners' approach would automatically eliminate any protection for inmates to freely exercise their religion, whenever the inmates' religious rights interfered with an institution's practices. Petitioners advance this approach, even though the state in this case is seeking to abridge a religious rite which has continued for five years without incident, involves attendance by lesser security inmates at a congregational Sabbath worship service that is a central tenet of the Muslim faith, and the prison continues to allow maximum security inmates the right to participate in the service.

Petitioners' rigid posture arises out of a failure to fully appreciate the unique and specially protected position that freedom of religious observance occupies in our constitutional scheme. The origins of the view that the right to free exercise of religion is a fundamental right of the highest order may be traced to the birth of this country itself, for many of those who settled this land came to America to escape religious persecution. See e.g., Everson v. Board of Education, 330 U.S. 1, 8-9 (1947). The reoccurrence of similar forms of persecution in early American life "shocked the

freedom-loving colonials into a feeling of abhorrence" and led to the "conviction that individual religious liberty could be achieved best under a government stripped of all power to interfere with the beliefs of a religious individual or group." Id. at 11.

Guided by the historic legacy of the founding of this nation, the Framers of the Constitution adopted the Free Exercise Clause to insulate religious practice from interference by the state.[7] Throughout the years, this Court has recognized the fundamental importance of the Free Exercise Clause, "... which, by its terms gives special protection to the exercise of religion." Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 713 (1981).

As Chief Justice Burger recognized, this Court has consistently emphasized "the central values underlying the Religion Clauses in our constitutional scheme of government", Wisconsin v. Yoder, 406 U.S. 205, 234 (1972), and the values underlying the Free Exercise Clause "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." Id. at 214. "[I]n this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" Sherbert v. Verner, 374 U.S. 398, 406 (1963) (citation omitted). "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." Thomas v. Review Board of the Indiana Employment Security Division, supra, 450 U.S. at 718. Even "a state's interest in universal

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7 The language of the Free Exercise Clause was apparently derived from Maryland's 1649 Act concerning religion (commonly known as the "Toleration Act"). See Schwartz, The Bill of Rights: A Documentary History 90-94, 232, 1121 (1971). The Toleration Act broadly protected an individual from being "any ways troubled, molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof..."

education, however highly we make it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment..." Wisconsin v. Yoder, supra, 406 U.S. at 214.

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion [Id. at 215].

Although imprisonment necessarily places limits upon many of the constitutional freedoms enjoyed by free citizens, see Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977) (and cases cited therein), "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." Bell v. Wolfish, 441 U.S. 520, 545 (1979) (and cases cited therein).[8] Indeed, this Court has emphasized that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972) (per curiam).[9]

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8 Certainly, the First Amendment must be applied "in light of the special characteristics of the... environment" in the particular case. Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969), and the problems governing persons inside prisons are greater and different from those in governing persons outside the walls. Jones v. North Carolina Prisoners' Labor Union, Inc., supra. But the fundamental importance of the values underlying the Free Exercise Clause of the First Amendment are not altered simply because the First Amendment claimants are incarcerated.

9 The right of prison inmates to free exercise of their religion has been recognized in many different contexts. See, e.g., Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976) (prisoner's right to grow beard for religious purposes); Kahane v. Carlson, 527 F.2d 491 (2d Cir. 1975) (prison must make allowance for religiously-based dietary restrictions); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967) (prisoner's right to religious services); Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969) (prisoners right of access to religious literature); Barrett v. Commonwealth of Virginia, 689 F.2d 498 (4th Cir. 1982) (legal recognition of prisoner's religiously motivated name change).

Despite these basic principles and the fundamental importance of the Free Exercise Clause, petitioners, in rejecting the appellate court's standard of mutual accommodation, demonstrate a total disdain for the values underlying the Free Exercise Clause, and a total disregard for the right of prisoners to retain some degree of protection for their religious freedom. Petitioners ignore the sincere and serious nature of respondents' constitutional claim, and seek to eliminate, in all but name only, judicial review of prison conduct that interferes with the fundamental constitutional rights of incarcerated inmates.

Not only do petitioners ignore the fundamental constitutional rights being asserted, but in a thinly veiled attempt to distract this Court's attention from the central issues in this case, petitioners conveniently overlook many of the factual claims which distinguish this case from the litany of other circuit court decisions cited by petitioners (Petition at 9-12). Unlike other prisoner rights cases,

> 1. This is not a matter in which inmates are asking the state to implement a novel program, enforce a previously unrecognized right, or engage in conduct which poses potential security problems for the institution. Rather, the inmates herein are seeking to preserve a longstanding religious practice which in the past has caused no substantial problems for the institution and its continuation in the present, poses neither a threat to security nor to internal discipline. Cf., Board of Education v. Pico, 457 U.S. 853, 871-872 (1982) (distinction in First Amendment analysis between acquisition of and removal of books from school library).[10]

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10 The district court even recognized that the institution's security claims were inapplicable to full minimum inmates, who are housed on the Farm, an open area, without a wall or a fence and physically separate from the main facility. As to the Farm, the district court stressed:

> [The security objective] does not account for the prohibition on full minimum prisoners' returning to the Farm during the day since these prisoners

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2. The religious practice at issue, attendance at an obligatory congregational Sabbath worship service, poses no threat to prison security or discipline.

3. The institution's policy effectively creates a double standard under which Muslim prisoners are denied rights of religious worship which are afforded adherents of religions with Saturday or Sunday services.

4. Petitioners' misplaced reliance on purported security concerns is underscored by the irrational effect of petitioners' policy changes, which result in maximum security inmates, those inmates who represent the greatest security risk and thus are confined to the institution, being permitted to continue to attend the Muslim Sabbath worship service, but gang minimum and minimum inmates who are the lesser security risks, being precluded from continuing to participate in this service.

5. The restriction being imposed is not a reasonable regulation of time, place or manner where there are readily available alternatives, but is an absolute prohibition on attendance at a Sabbath worship service, the practice of which must be observed during certain limited hours, is obligatory, cannot be made up, must be performed in congregation and is the central service of the Muslim faith.

6. Pursuant to petitioners' enumerated inmate classification guidelines, the State of New Jersey is effectively conditioning an inmate's right to obtain the greater privileges consistent with receipt of a lower custodial security classification, upon the requirement

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> do not have to pass through the gate to enter the Farm unit. A second goal was advanced in support of the March, 1984 policy. This goal was framed in terms of rehabilitation. It was stated that, in order for prisoners to be ready to undertake careers in the free society, they would have to learn to work a full, productive day without taking time off from their jobs to pursue personal matters (emphasis in original) [46A].

Whatever the validity of the institution's goal of instilling in inmates a strong work ethic at the expense of their religious rights, we know of no case from the circuit courts which denies inmates fundamental First Amendment rights in the face of such a rationale.

> that an inmate forego commands of conscience and sincerely held religious beliefs.[11]

In their haste to deprive prisoners of basic religious freedom, petitioners ignore the central facts of this case which render review by this Court at this time inappropriate. The United States Constitution was drafted almost 200 years ago, based on an act of faith that a just society that preserves certain basic rights for all human beings is possible. It would indeed be ironic that in the very year when we are approaching the bicentennial celebration of the enactment of the United States Constitution, we would accept petitioners' narrow vision and eviscerate those very values and rights that the Constitution was adopted to protect and promote.

2. THE THIRD CIRCUIT'S REQUIREMENT OF A MUTUAL ACCOMMODATION BETWEEN THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF PRISONERS TO FREELY EXERCISE THEIR RELIGION AND THE INSTITUTION'S LEGITIMATE CONCERNS IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Petitioners contend that the Third Circuit's requirement of a reasonable effort at effecting mutual accommodation between the fundamental constitutional rights of prisoners to freely exercise their religion and an institution's legitimate penological objectives contravenes this Court's prior decisions. While quoting at

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11 As Chief Justice Burger reiterated in Thomas v. Review Board of the Indiana Employment Security Division, supra, 450 U.S. at 717-718:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

length from this Court's opinions in the past decade involving prisoner rights, petitioners cavalierly ignore the analysis central to this Court's reasoning in those cases. Rather than contradicting this Court's precedents, the Third Circuit's decision comports with the approach taken by this Court.

Although "[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen," Wolff v. McDonnell, 418 U.S. 539, 555 (1976), it is now beyond dispute that there is "no iron curtain drawn between the Constitution and the prisons of this country." Id. at 555-556. Rather, it has been repeatedly recognized that prisoners are not beyond the protection of the Constitution. For example, this Court has held that invidious racial discrimination is as intolerable within a prison as without, except as may be essential to "prison security and discipline." Lee v. Washington, 390 U.S. 333 (1968) (per curiam). Like others, prisoners retain the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts. Johnson v. Avery, 393 U.S. 483 (1969). Prisoners may not be deprived of life, liberty or property without due process of law, see e.g., Wolff v. McDonnell, supra; Haines v. Kerner, 404 U.S. 519 (1972), and the Eighth Amendment ensures that they will not be subject to "cruel and unusual punishment." Estelle v. Gamble, 429 U.S. 97 (1976).[12]

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12 Indeed, there can be little doubt that courts of this country have a special obligation to protect the rights of prisoners. See Rhodes v. Chapman, 452 U.S. 337, 358-361 (1981) (Brennan J., concurring in judgment). "Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a 'discrete and insular minority.'" Hudson v. Palmer, ___ U.S. ___, 82 L.Ed.2d 393, 423 (July 3, 1984) (Stevens J., concurring in part and dissenting in part). As Justice Stevens, previously stressed while writing as a Circuit Judge on behalf of the Seventh Circuit:

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Furthermore, "[a] prisoner does not shed...basic First Amendment rights at the prison gate." Procunier v. Martinez, 416 U.S. 396, 422 (1974) (Marshall J., concurring). Rather, they retain those rights "not inconsistent with [their] status as...prisoner[s] or with legitimate penological objectives of the correction system." Pell v. Procunier, 417 U.S. 817, 822 (1974). Under this principle, "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972) (per curiam); Cooper v. Pate, 378 U.S. 546 (1966).

It is certainly true that "[t]he fact of confinement as well as the legitimate goals and policies of the penal institution limits [inmates'] retained constitutional rights." Bell v. Wolfish, supra, 441 U.S. at 546 (and citations therein). Nonetheless, this Court has consistently held that "[t]here must be a 'mutual accommodation between institutional needs and objectives and the provisions of the constitution that are of general application.'" Id. at 546; Wolff v. McDonnell, supra, 418 U.S. at 556.

Despite the fundamental rights being asserted herein, petitioners contend that the inmates' constitutional claims automatically fail because of the prison's opposition. Certainly, some

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> [T]he view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. 'Liberty' and 'custody' are not mutually exclusive concepts.

United States ex. rel. Miller v. Twomey, 479 F.2d 701, 712 (7th Cir. 1973) (footnotes omitted), cert. denied, 414 U.S. 1140 (1974).

rights are necessarily forfeited by incarceration and the concomittant need for prison security. But the need for security does not justify a court's abdication of its responsibility to ensure that the limits imposed by the constitution are not ignored in the name of security.

Nor may free exercise rights of inmates be sacrificed simply because the state says they must be. Surely, application of the Free Exercise Clause must take into account the exigencies of incarceration. But prisoners do not forfeit their constitutional rights at the prison gates. Except as to those rights "inconsistent with [their] status as . . . prisoner[s] or with legitimate penological objectives of the correction system," Pell v. Procunier, supra, 417 at 822, the incarcerated as well as the free are entitled to follow the dictates of their faith.

None of the cases relied upon by petitioners compel a contrary conclusion or undermine the Third Circuit's reasonable accommodation test. In Pell v. Procunier, 417 U.S. 817 (1974), this Court upheld a prohibition against face-to-face visits between prisoners and news reporters. In upholding the limitation on inmates' unfettered rights to communication, this Court stressed that other available avenues of communications remained open to the prisoners. Id. at 824-25. Accordingly, the regulation was characterized as a reasonable "time, place or manner" restriction, Id. at 826; see Grayned v. City of Rockford, 408 U.S. 104 (1972). The regulation was upheld because it met the traditional "time, place or manner" test. It was content neutral in that it applied equally to all prisoners and all reporters and, most significantly, several alternative means of communicating with the public, including with reporters, were available to the inmates. Pell v. Procunier, supra, 417 U.S. at 824 825. Finally, the obvious magnitude of the security concerns

triggered by the entry of outsiders into the prison for face-to-face communication with the inmates compelled this Court to uphold the ban on prison interviews by the news media. Id., 417 U.S. at 826.

Here, by contrast, the prohibition on Jumu'ah attendance is not a time, place or manner regulation, but an absolute prohibition on participation in obligatory congregational Sabbath prayer, which is a central tenet of the Muslim religion. Nor is the regulation content neutral, as the elimination of the Friday alternate work detail results in the denial of rights of worship to Muslim inmates which are afforded adherents of religions with Saturday or Sunday services. Finally, attendance at Jumu'ah, which has posed no security problems in the past, and which is continuing in the present for maximum security inmates, does not pose the kind of potential security problem which was triggered by the entry of outsiders to the prison in Pell.

Similarly, nothing in Jones v. North Carolina Prisoners' Labor Union, Inc., supra, compels a contrary conclusion. Therein, this Court upheld a ban against solicitation and meetings by a prisoner's labor union. The Court explicitly stated "First Amendment speech rights are barely implicated." Id. at 130 (footnote omitted). Although that statement alone suffices to distinguish Jones from this case, numerous other grounds exist. The Court stressed that prohibitions on bulk mailings are reasonable as other avenues of communication are available. Id. 433 U.S. at 131. Furthermore, this Court reasoned that First Amendment associational rights which are most directly implicated by the regulatory prohibitions in Jones, are rights which are "necessarily curtailed by the realities of confinement." Id., 433 U.S. at 132. Finally, a prisoner's union was viewed as presumptively dangerous. "The case of a prisoner's union, where the

focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials surely would rank high on anyone's list of potential trouble spots." Id., 433 U.S. at 133.

In the case at bar, respondents' free exercise rights are directly implicated, there are no available alternatives, and attendance at Jumu'ah cannot be considered presumptively dangerous, particularly when maximum security inmates, those who pose the greatest danger for the institution, are still able to participate in the service. Finally, the right of free association, which is not as firmly anchored in the text of the First Amendment as the Free Exercise Clause, is one of the constitutional rights most severely curtailed by confinement. In contrast, observance of a religious tenet is certainly not inconsistent with the status of being a prisoner, and in fact may foster respect and rehabilitation.

Nor does this Court's holding in Bell v. Wolfish, supra support the approach advocated by petitioners herein. There, a group of pretrial detainees contended among other things, inter alia, that a regulation prohibiting the receipt of hardback books not mailed directly from publishers, bookclubs or bookstores violated the First Amendment. The receipt of paperback books, magazines, and other soft-covered materials from any source was permitted. This Court upheld the prohibition, concluding that it was a rational response to an obvious security problem. Id, 441 U.S. at 550. "It hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs and weapons may be secreted in the bindings." Id. 441 at 551 (citation omitted). Furthermore, the regulation was characterized merely as a "time, place or manner restriction," there were available alternate means of obtaining

reading material, and since the claimants were pretrial detainees, most of whom were released in sixty days, the prohibition resulted in only a limited deprivation. Id., 441 U.S. at 551-552.

The restriction being imposed by petitioners in this case is not a reasonable regulation of time, place or manner where there are readily available alternatives, but an absolute prohibition on attendance at a congregational worship service, an activity which is not presumptively dangerous nor in the past has it posed any threat to institutional security.

In sum, nothing in the Third Circuit's opinion contravenes this Court's holdings in Pell, Jones, and Wolfish. Rather, the results in those cases are attributable to the weakness of the rights asserted and the strength of the state's interests supporting the infringement.[13] Nothing therein detracts from the mutual accommodation test set forth by the Third Circuit in the case at bar. Indeed, such a test effectively balances both the transcendent imperatives of the inmates' First Amendment rights to the free exercise of their religion and the state's legitimate penological objectives.

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13 Indeed, the results in those cases should be contrasted with the holding in Procunier v. Martinez, supra, where this Court in striking down a prison censorship regulation stated:

> First, the regulation or practice in question must further an important or substantial government interest, unrelated to the suppression of expression. Prison officials . . . must show that a regulation . . . furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitations of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus, a restriction . . . that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. [416 U.S. at 413-414].

3. THE THIRD CIRCUIT'S REQUIREMENT OF MUTUAL ACCOMMODATION BETWEEN THE CONSTITUTIONALLY PROTECTED RIGHTS OF PRISONERS AND THE INSTITUTION'S LEGITIMATE CONCERNS IS NOT INCONSISTENT WITH THE RECOGNIZED NEED FOR DEFERENCE TO THE JUDGMENT OF EXPERIENCED PRISON OFFICIALS.

At the core of petitioners' objection to the decision of the Third Circuit, is petitioners' belief that federal courts must give absolute deference to the judgment of experienced prison officials and that the lower court's opinion "ties the hands of the state prison officials." Such a myopic view distorts the Third Circuit's opinion, misapplies the rule of deference in constitutional analysis, dangerously undermines the right of free exercise of religion, and forecloses meaningful judicial review of violations of fundamental constitutional rights.

As a threshold matter, contrary to petitioners' claims, the Third Circuit in its opinion repeatedly recognizes the importance of judicial deference to the expert opinions of prison administrators. Thus, the Court stresses "the need for deference to experienced prison officials' judgment" (citations omitted) (7A), and the need for federal courts to "afford deference to decisions by prison officials in areas concerning security. . ." (10A).

However, contrary to petitioners' claim, judicial deference to the professional judgment of prison administrators should not be converted into judicial abdication of the constitutionally mandated role of the federal courts. "The deference owed to an expert tribunal cannot be allowed to slip ino judicial inertia. . ." American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965).

The "very essence of judicial duty," Marbury v. Madison, 1 Cranch 137, 178 (1803), is the implementation and protection of the constitutional scheme. While the Third Circuit recognized the expertise of prison administrators, the Circuit also recognized that courts may not forego their constitutional mandate

simply because a case arises in a prison setting. As Justice Jackson stated:

> [W]e act in these matters not by authority of our competence, but by force of our commissions. We cannot, because of modest estimates of our competence in . . . specialities . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed [West Virginia Board of Education v. Barnette, 319 U.S. 624, 640 (1943)].

As Chief Justice Marshall reiterated: "That this court dares not usurp power is most true. That this court dares not shrink from its duty is no less true." 2 Burr's Trial at 444.

Petitioners are effectively arguing that their interest in security is so great that it can never tolerate any accommodation to religious freedom.

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exception [Wisconsin v. Yoder, supra, 406 U.S. at 221].

As Circuit Judge Irving Kaufmann has recently stressed, where an inmate alleges the infringement of constitutional rights, the judiciary has the duty to interfere in the internal affairs of a prison.

> In the great majority of cases, it would be sheer folly for society to deny prison officials the discretion to act in accordance with their professional judgment. At the same time, it would be an abrogation of our responsibility as judges to assume (or, more precisely, to reassume) a 'hands off' posture, requiring categorical acquiescence in such judgments. Where an inmate alleges that precious constitutional rights are being abridged, the judiciary has the power, and indeed the duty, to intervene in the internal affairs of a prison. Balancing the wisdom of judicial deference against the need for courts to involve themselves in preserving precious liberties is a task of inordinate difficulty. But face it we must if we are to discharge our arduous and delicate duty as

protectors and defenders of the Constitution [Abdul Wali v. Coughlin, 754 F.2d 1015, 1018 (2d Cir. 1985)].

"Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties." Pell v. Procunier, supra, 417 U.S. at 827. Moreover, a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims... When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights. Procunier v. Martinez, supra, 416 U.S. at 405-406. Accord, Johnson v. Avery, supra, 393 U.S. at 486.[14]

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14 As Justice Marshall stressed in his dissent in Jones v. North Carolina Prisoners' Labor Union, supra, 433 U.S. at 141, although the realities of running a penal institution are complex and difficult and correctional officers certainly possess professional expertise, it is equally true that the realities of running a school or a city are also complex and difficult and those charged with overseeing such tasks--principals, mayors, and law enforcement personnel also possess professional expertise. Yet, in those cases, the wholesale abandonment of First Amendment rights has not been justified merely because the judgment of the relevant officials is rational. See e.g., Healy v. James, 408 U.S. 169 (1972);Tinker v. Des Moines Schol District, 393 U.S. 503 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

There are sound reasons why a court should not blindly defer to the judgment of prison officials. Because the prison administrator's business is to maintain order, "there is the danger that he may well be less responsive than a court--part of an independent branch of government--to the constitutionally protected interests in free expression." Freedman v. Maryland, 380 U.S. 51, 57-58 (1965). Indeed, because a warden will seldom be subject to public criticism because the state has needlessly repressed First Amendment freedom, prison officials "inevitably will err on the side of too little freedom." Jones supra at 141-142 (Marshall J. dissenting). That this has occurred in the past is demonstrated by the report of the American Bar Association's Joint Committee on the Legal Status of Prisoners:

> All organizations including correctional organizations overreact to suggested changes,

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The issue is not, as petitioners contend, one of absolute deference to the judgment of prison administrators. Rather, the task is to determine the degree of deference to be accorded in a given setting. Abdul Wali v. Coughlin, supra, 754 F.2d at 1033. There are strong reasons why in the case sub judice, the lower court properly held that "deference must be tempered by an effect to accommodate free exercise values." (10A). First of all, the rights being asserted are not ones of peripheral constitutional concern or ones necessarily curtailed by the mere fact of confinement, but rather are rights at the core of the protection of the Constitution, observance of which is not inconsistent with the status of being a prisoner.[15]

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> whether sweeping or merely incremental. ...[M]any of the fears voiced by prison officials in the 1960s to the growing tide of court determinations invalidating prison regulations have simply not come to pass; indeed, in several instances ... those groups feared by the prisons in the 1960s have become stabilizing influences in the 1970s.

ABA Joint Committee on the Legal Status of Prisoners, The Legal Status of Prisoners, (Tent. Draft 1977), reprinted in 14 AM. CRIM. L. REV. 377, 419 (1977).

15 Indeed, the New Jersey State Corrections regulations require that: "[a]ll inmates shall be afforded full and equal opportunity to practice their religion, or to refrain from involvement in religion." N.J.A.C. 10A:31-3.21(b)(7). Regulations of the Federal Bureau of Prisons mandate that a warden should endeavor to permit inmates to observe important religious celebrations and ordinarily allow an inmate to be relieved from institutional assignments and to make up missed work.

> §548.14 Institution work assignment.
>
> Except where necessary for maintaining security, safety, and good order in the institution, an inmate may not be given a work assignment which violates the specific requirements of that inmate's religious faith. The inmate must initiate the request for a different work assignment.
>
> §548.15 Scheduling to observe religious

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Secondly, the restriction being imposed is not a reasonable time, place or manner regulation, where there are readily available alternatives. Rather, petitioners seek to impose an absolute prohibition on attendance at a congregational Sabbath worship service, an observance which is obligatory, cannot be made-up and is a central tenet in the Muslim faith. Finally, the religious rite in question is not presumptively dangerous, has occurred in the past without incident, and is currently being engaged in by maximum security inmates, prisoners who theoretically pose the greatest security threat to the institution.

Furthermore, petitioners in their argument for judicial deference, completely ignore the important values and rehabilitative benefits which religion offers incarcerated inmates. The values

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holidays, celebrations, and activities.

(a) Consistent with maintaining security, safety, and good order in the institution, the Warden shall endeavor to facilitate the observance of important religious holidays or celebrations in accordance with specific requirements of a faith group, such as fasting, worship, diet, or work proscription. The inmate must initiate request for observance of a religious holiday or celebration, and must specify in this request the nature of the observance and the particular accommodation requested. The Warden may request the institution chaplain to verify the specified religious requirements with representatives of the inmate's faith group and/or other appropriate sources. Consistent with maintaining security, safety, and good order in the institution, the Warden is ordinarily to allow an inmate to take non-consecutive vacation days, or to make up for missed work, or to change work assignments in order to facilitate the inmate's observance of a religious holiday or celebration.

(b) The Warden may relieve an inmate from an institution program or assignment if a religious activity is also scheduled at that time. [28 C.F.R. §§548.14, 548.15].

that underly the Free Exercise Clause and make it one of the "preferred" freedoms," see e.g., West Virginia State Board of Education v. Barnette, supra, 319 U.S. at 639; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), are as vital to those inside the prison walls as they are to those outside. See, e.g., Comment, The Religious Rights of the Incarcerated, 125 UNIV. OF PA. L. REV. 812, 852-854 (April 1977).[16] Nonetheless, the lower court virtually ignored the individual constitutional interests of the inmates and the values underlying First Amendment guarantees.

Furthermore, both courts and commentators have recognized that religious involvement serves important rehabilitative functions. Thus, religious participation can significantly assist an inmate in revaluating himself and preparing for a return to society. See, e.g., H. Barnes & N. Teeters, NEW HORIZONS IN CRIMINOLOGY 492-495 (3d ed. 1959). "In the lonely stifling prison environment, an inmate can sometimes find great strength and self-respect in religious practice." 125 UNIV. OF PA. L. REV. supra at 854 (and citations therein). Furthermore, the psychological literature indicates that religion plays a substantial role in promoting prosocial behavior, see, e.g., C. Daniel Batson, "Sociobiology and the Role of Religion in Promoting

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16 Professor Giannella identified the fundamental free exercise value as "respect for the inviolability of conscience." Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, (part 1), 80 HARV. L. REV. 1381, 1386 (1967). "Personal alienation from one's Maker, frustration of one's ultimate mission in life, and violation of the religious person's integrity are all at stake when the right to worship is threatened." Id. at 1427. "An inmate's conscience is no less inviolable than that of an unconfined citizen, and a violation could well work an even greater harm upon the inmate, whose means of spiritual recovery are limited by the prison environment." Comment, The Religious Rights of the Incarcerated, 125 UNIV. OF PA. L. REV., supra at 853-854.

Prosocial Behavior: An Alternative View," 45 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 1380 (1983), and that an individual who has accepted religious doctrine is less likely to exhibit hostility than a person not governed by the same religious mores. See, e.g., M. Heintzelman and L. Fehr, Relationship Between Religious Orthodoxy and Three Personality Variables, 38 PSYCH. REPORTS 756 (1976).

Indeed, the courts have recognized the important rehabilitative role played by religion. Thus the Court of Appeals for the District of Columbia stressed:

> Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erodes the very foundations upon which he can prepare for a socially useful life. Religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality.

Barnett v. Rodgers, 410 F.2d 995, 1002 (D.C. Cir. 1969) (footnotes omitted); Cochran at 566, 570 (N.D. Ill. 1977) ("This Court has long shared the opinion that rehabilitation is incident to a prisoner's free pursuit of his or her faith.").

In seeking review of the Third Circuit's decision, petitioners completely ignore these values. In so doing, petitioners fail to properly evaluate the important constitutional interests at stake as well as the benefits which would inure to the institution by permitting respondents to continue to practice their religion without interference.[17]

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17 Ironically, although petitioners are seeking to impede religious practice, American prisons originally were isolated asylums in which offenders were to render unto God the reverance and obedience that they had wrongfully denied him by committing crimes. D. Rothman, The Discovery of the Asylum, 85-86 (1971). Pioneered by William Penn and the Quakers and implemented in 1789 at the Walnut Street Gaol in

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Despite the underlying values and transcedent imperatives of the Free Exercise Clause, petitioners would substitute judicial abdication for judicial analysis. We know of no decision of this Court which warrants such wholesale abandonment of the basic principles of judicial review.[18]

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Philadelphia, this approach sought to provide the prisoner with a place

> in which he could cogitate about his salvation, become reacquainted with his God, and do penance. Hence, the name of the institution - 'penitentiary.' When such a reassessment of self had occurred, the offender could, theoretically, return to the community, literally a 'new man.' This religious foundation of the institution led to conditions much like those endured by others who sought God. Like seminarians, prisoners were subjected to physical pain, sparse food, and isolation from the community.

R. Singer & W. Statsky, Rights of the Imprisoned: Cases, Materials and Directions 4 (1974). The emphasis on religion which permeated the Pennsylvania system of imprisonment became the guiding influence in the European corrections community. Id. at 4-5. See also Comment The Religious Rights of the Incarcerated, 125 UNIV. OF PA. REV. supra at 819-820.

18 Although not reached by the Third Circuit, respondents also contend that petitioners violated the Fourteenth Amendment by denying Muslim inmates rights afforded adherents of religions with Saturday or Sunday Sabbaths. The Fourteenth Amendment commands that a prisoner be afforded "reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts..." Cruz v. Beto, supra, 405 U.S. at 322 Accord, Cooper v. Pate, supra (petitioner stated cause of action where he alleges that he was denied permission to purchase certain religious publications and denied privileges enjoyed by other inmates). "When one faith is more heavily restricted than another, the courts must closely scrutinize the reasonableness of any restrictions." Native American Council of Tribes v. Solem, 691 F.2d 382, 384 (8th Cir. 1982) (citation omitted);Cooper v. Pate, 382 F.2d 518, 521-522 (7th Cir. 1967).

By not making provisions for Muslim inmates to worship on their Sabbath, while nevertheless allowing adherents of religions with Saturday or Sunday Sabbaths to worship, petitioners have denied Muslim inmates "a reasonable opportunity of pursuing [their] faith comparable to the opportunit[ies] afforded fellow prisoners who adhere to conventional religious precepts. . ." Cruz v. Beto, supra, 405 U.S. at 322, and thereby violated the guarantees

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CONCLUSION

In enacting the Bill of Rights, the Framers of the Constitution intended to ensure that certain principles would not be sacrificed to political expediency: these principles are enshrined as principles of fundamental law beyond the reach of governmental officials and legislative majorities. See, West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943). Freedom of Religion constitutes one of those preferred freedoms. Id.

Moreover, courts have a special obligation to protect the rights of prisoners. More than a decade ago, Justice Stevens wrote on behalf of the Seventh Circuit:

> [T]he view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. 'Liberty' and 'custody' are not mutually exclusive concepts.

United States ex. rel Miller v. Twomey, supra, 479 F.2d at 712 (footnote omitted). Petitioners in denying Muslim inmates the right to continue to attend their Sabbath services, are seeking to eviscerate Muslim inmates' basic constitutional rights and turn back the clock on an ethical tradition and constitutional principle which we had thought was enshrined forever in our jurisprudence.

Footnote Cont'd From Previous Page

By not making provisions for Muslim inmates to worship on their Sabbath, while nevertheless allowing adherents of religions with Saturday or Sunday Sabbaths to worship, petitioners have denied Muslim inmates "a reasonable opportunity of pursuing [their] faith comparable to the opportunit[ies] afforded fellow prisoners who adhere to conventional religious precepts. . ." Cruz v. Beto, supra, 405 U.S. at 322, and thereby violated the guarantees afforded respondents by the Equal Protection Clause. See, e.g., Cooper v. Pate, supra; Native American Council of Tribes v. Solem, supra. Principles of deference are no more applicable in analyzing respondents' Fourteenth Amendment claims as they are in analyzing respondents' First Amendment claims.

For all of the foregoing reasons, respondents pray that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

By: _____

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DATED: June 30, 1986